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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

**ENTERED
Office of Proceedings**

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Public Record**

**SOUTH MISSISSIPPI ELECTRIC POWER
ASSOCIATION**

Complainant,

v.

NORFOLK SOUTHERN RAILWAY COMPANY

Defendant.

Docket No. NOR 42128

**NORFOLK SOUTHERN RAILWAY'S REPLY IN OPPOSITION TO
COMPLAINANT'S PETITION TO REVISE PROCEDURAL SCHEDULE**

Pursuant to 49 C.F.R. Parts 1111 and 1117 and other applicable law and authority, Defendant Norfolk Southern Railway Company ("NS") respectfully submits this Reply to Complainant South Mississippi Electric Power Association's ("SMEPA") Petition to Revise Procedural Schedule ("Petition"), filed on August 3, 2011. NS agrees that an adjustment to the current procedural schedule is appropriate because NS was only recently authorized by the Federal Railroad Administration ("FRA") to produce traffic data containing Sensitive Security Information ("SSI"). NS promptly produced that data to SMEPA on August 2, 2011. However, the length of the extension proposed by SMEPA would not be consistent with the original schedule and the Board's mandate to "provide for the expeditious handling and resolution of all proceedings." 49 U.S.C. § 10101(15).

NS opposes the SMEPA seeks in its Petition and requests that the Board instead revise the procedural schedule to accommodate SMEPA's legitimate need to use recently produced railroad traffic information to complete preparation of its opening evidence without causing unnecessary further delay. NS proposes a schedule that would: (1) require SMEPA to submit its

Opening Evidence on October 19, 2011, providing SMEPA with approximately the same amount of time between the production of the traffic data and submission of Opening Evidence as the schedule issued by the Board provides between the close of discovery and the submission of Opening Evidence; (2) require NS to submit its Reply Evidence by February 20, 2012; (3) require SMEPA's Rebuttal Evidence to be submitted by May 11, 2012; and (4) require closing briefs be filed no later than June 22, 2012. *See Exhibit.* NS's proposed schedule is fair to SMEPA because it provides for a reasonable extension of the current procedural schedule in light of its delayed receipt of traffic data. But it also recognizes that SMEPA has had ample time to prepare many other elements of its standalone cost ("SAC") case that do not require railroad SSI, and is more consistent with the Board's mandate to process and resolve rate cases expeditiously.

I. FACTUAL BACKGROUND

The Board issued the Procedural Schedule in this case on March 14, 2011. Under that schedule, discovery was due to conclude on June 15, 2011. *See SMEPA v. NS*, STB Docket No. 42128, Decision at 4 (March 14, 2011). With one significant exception, NS completed discovery production in accordance with that schedule. That exception was traffic and event data containing SSI, which is subject to special restrictions and security requirements imposed by FRA and the Transportation Security Administration ("TSA"). After NS advised SMEPA and the Board that NS could not produce that data without FRA authorization, the Board, the parties, and representatives of FRA and TSA held discussions regarding whether and under what conditions NS could produce data including SSI to rate case complainants. FRA and TSA took the matter under advisement and promised an expeditious resolution of the issues.

On or about July 29, 2011, FRA issued an Order and accompanying Memorandum designating certain railroad traffic information as SSI. The FRA Order and Memorandum also

established conditions under which rail carriers could produce traffic data containing SSI to outside counsel and consultants to complainants in STB rate cases. *See* SSI Order 2011-06-FRA-01. NS received the Order on August 1, 2011 and produced its traffic data containing SSI to SMEPA early the next day.

On August 1, 2011, before the parties were aware of FRA's Memorandum and Order, SMEPA contacted NS to propose an extension of the procedural schedule. At that time, it appeared to the parties that a decision on the SSI issue from FRA might not be forthcoming in the immediate future, and SMEPA presumably included extra time in its proposed schedule to account for that contingency. Following the parties' receipt of the FRA Memorandum and Order, counsel for NS sent to counsel SMEPA a revised proposed schedule. NS's proposal took into account NS's recent production of traffic and event data -- Because SMEPA now has NS traffic data, NS proposed to move the Opening Evidence date to October 19, maintaining the same approximate interval from completion of discovery production to filing of Opening Evidence as provided by the existing schedule. Despite NS's August 2 production of the traffic and event data, however, SMEPA declined to move up its proposed due date (December 9, 2011) for Opening Evidence. NS then suggested an intermediate compromise time for filing opening evidence, and SMEPA again refused to move from its initial proposal. SMEPA then filed its Petition to revise the procedural schedule. SMEPA's Petition requests that the Opening Evidence submission be delayed over three more months, meaning six months would elapse between the close of discovery and the submission of Opening Evidence.

II. ARGUMENT

NS does not contest that the current procedural schedule should be modified.

Due to federal regulations governing the security and disclosure of SSI and the need for FRA authorization to produce SSI, NS was unable to produce certain rail traffic data to SMEPA until August 4, 2011, approximately one and a half (1 ½) months after the scheduled close of discovery. As explained, NS proposed an alternative schedule extension that would move the Opening Evidence due date back by that same amount of time (1 ½ months), to preserve the time interval provided by the Board's current schedule. SMEPA declined that proposal, as well as an NS offer to compromise between the two parties' proposed schedules.

The revised procedural schedule NS proposes in this Reply provides adequate time for SMEPA to review the recently produced data and to complete development of its opening SAC evidence. Unlike SMEPA's Petition, NS's proposal takes into account the fact that discovery closed on June 15, 2011 and that SMEPA has had substantial time to develop myriad other elements of its case that do not require use of rail data containing SSI. Although SMEPA has repeatedly complained that it is being "irreparably harmed" by delay in the processing of this case, it refused to agree to NS's proposed schedule, which would result in an earlier close of the evidence and presumably more expeditious resolution of the case. *Compare* SMEPA Motion to Compel Discovery at 3, 19 (July 22, 2011) *with* SMEPA Petition to Revise Discovery Schedule (Aug. 3, 2011). NS's proposed schedule provides for the same interval between the filing of Opening Evidence and NS's production of the last significant component of discovery as the current schedule provides between the close of discovery and the due date for Opening Evidence, thereby avoiding unnecessary delay.

In contrast, the revised schedule proposed by SMEPA would delay its submission of Opening Evidence by over three months, thereby further delaying the resolution of this case. Congress and the Board have made clear their desire that rate cases be handled expeditiously. *See, e.g., Seminole Electric Cooperative Inc. v. CSX Transp.*, at 2 STB Docket No. 42110 (December 10, 2008) (“[W]e would like SAC cases to be concluded as expeditiously as possible.”); *Arizona Electric Power Cooperative, Inc. v. BNSF Rwy. Co. and Union Pac. R.R. Co.*, STB Docket No. 42113 (February 3, 2009) (Rejecting as “unnecessarily long” a procedural schedule with four months elapsing between the close of discovery and the filing of Opening Evidence); 49 U.S.C. § 10101(15). Further, the law also provides that if a case is not concluded within three years of filing it is automatically dismissed. 49 U.S.C. § 11701(c). And in this very proceeding, SMEPA has emphasized the importance of expeditious resolution. In its Motion to Compel, SMEPA characterized a months long delay as “unconscionable” and causing “irreparable harm.” *SMEPA v. NS*, STB Docket No. 42128, Motion to Compel at 3, 19 (July 22, 2011).

A. NS’S PROPOSED SCHEDULE IS REASONABLE AND FAIR.

NS proposes a revised procedural schedule that would provide SMEPA with sufficient time to review and incorporate traffic data in its Opening Evidence:

(1) SMEPA’s Opening Evidence would be due by October 19, 2011, which would provide SMEPA with approximately the same amount of time to complete its Opening Evidence as contemplated by the original schedule. This time interval is reasonable and consistent with the Board’s judgment in issuing the Procedural Schedule. In contrast, SMEPA’s Petition seeks four (4) months from the date the railroad SSI was produced until the date Opening Evidence must be submitted, far exceeding the two and a half (2 ½) months the Board authorized in the existing procedural schedule. Some extension of the schedule is warranted by the delay in producing the railroad traffic data, but this does not mean SMEPA should be granted substantially more time to prepare its Opening Evidence than it would have had in the absence of that delay;

(2) NS's Reply Evidence would be due by February 20, 2012, providing NS a somewhat longer period to submit its Reply Evidence than under the Board's original procedural schedule. That longer period of time is to account for the multiple holidays – and fewer working days – during November and December. During those year-end holidays, it is difficult for the parties, their lawyers, and consultants to coordinate their work on SAC Evidence. Adding time to the period between the Opening Evidence and Reply Evidence due dates is thus appropriate to account for reduced work days and productivity during the holidays from late November to early January;

(3) SMEPA's Rebuttal Evidence would be due by May 11, 2012. That would provide a slightly longer period for SMEPA to submit its Rebuttal Evidence than the original procedural schedule;

(4) Closing briefs would be submitted by June 22, 2012. That is a slightly longer period than provided by the Board's original procedural schedule. The additional time is intended to account for the Memorial Day holiday that falls during this time interval.

**B. SMEPA HAS HAD AMPLE TIME TO DEVELOP MUCH OF ITS
OPENING EVIDENCE BASED ON ALL OF THE OTHER MATERIAL
PRODUCED IN DISCOVERY.**

Presumably SMEPA has not been in a holding pattern during the last several months simply awaiting the completion of production all railroad data before it commenced work on its Opening Evidence. With the exception of traffic data, NS substantially completed its production of discovery material by June 15.¹ Although traffic data is undeniably important to the development of SAC evidence, it is far from the only information used to prepare that evidence. And, the absence of traffic data does not prevent a complainant from developing many other components of its SAC evidence.

NS produced responsive discovery information to SMEPA throughout the discovery period that ran from January 14 through June 15, 2011. It has been nearly six months since NS began producing responsive discovery to SMEPA, and more than a month since NS substantially completed that production, with the exception of the traffic data NS produced on August 2, 2011.

¹ This production included most significant NS transportation contracts, which avoided delay that would have resulted if SMEPA were required to select contracts based upon the traffic data.

During those four months, NS produced myriad documents and many gigabytes of data and information that SMEPA can use to develop numerous important components and modules of its SAC case, including engineering and road property investment unit costs; operating expense unit costs; maintenance of way costs; inflation and cost-escalation indices; general and administrative costs; and numerous other essential components of a SAC presentation. During the last six months, SMEPA should have, and presumably has, developed all or nearly all components of its SAC evidence except those that require use of traffic data.² Were the Board to adopt SMEPA's proposed schedule, the complainant would have a lengthy six months from the close of discovery and more than four months from NS's production of the last piece of discovery (traffic data) to prepare its Opening Evidence, which is far in excess of the intervals in the Board's current procedural schedule. *See* Decision at 4, STB Docket No. 42128 (March 14, 2011) (providing two and a half (2 ½) months between the close of discovery and the Opening Evidence due date). In contrast, SMEPA's proposed revised schedule would allow less than half that six months for NS to submit its own Reply Evidence.

C. THIS CASE DOES NOT REQUIRE A MORE LENGTHY EXTENSION.

The Board should also consider the context and nature of this case in determining the appropriate length of a schedule extension. There is only one destination at issue, SMEPA's R.D. Morrow, Sr. Generating Station near Richburg, Mississippi. The alternative routes for movements to that destination are limited. The only issue commodity is coal. Significantly, SMEPA was able to propose operating characteristics for the issue lanes without any caveats or reservations regarding the need for review of traffic data to either expand the number of lanes at

² Although SMEPA's Complaint also invokes the "revenue adequacy" constraint, the traffic data that NS produced in August is not directly relevant to that issue and would not be necessary for SMEPA to develop its revenue adequacy submission.

issue or refine the characteristics. *See SMEPA v NS*, STB Docket. No. 42128, Joint Submission of Operating Characteristics (July 15, 2011). While no SAC case is simple, the present case lacks the complexity and multitude of origin and destination pairs of other matters the Board has addressed on more expeditious procedural schedules.

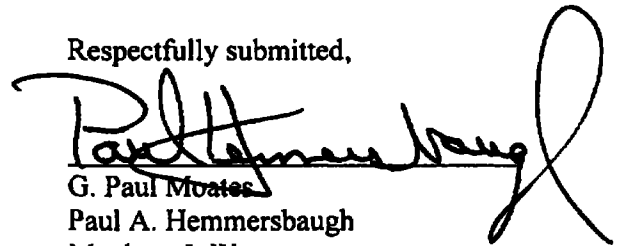
The Board should revise its procedural schedule to accommodate SMEPA's legitimate need to review and incorporate railroad SSI by adopting NS's proposed schedule. The more modest extension NS has proposed is reasonable and appropriate and more consistent with the Board's responsibility to decide cases expeditiously and therefore should be adopted.

CONCLUSION

For the foregoing reasons, the Board should deny SMEPA's Petition and adopt NS's proposed procedural schedule.

James A. Hixon
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Respectfully submitted,



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EXHIBIT

South Mississippi Electric Power Association

v.

Norfolk Southern Railway Company,

STB Docket No. 42128

Norfolk Southern Proposed Revised Procedural Schedule

Current Date	NS Proposed Date	Event	Day (NS Proposal)*
September 2, 2011	October 19, 2011	Complainant Files Opening Evidence	295
December 16, 2011	February 20, 2012	Defendant Files Reply Evidence	419
March 2, 2012	May 11, 2012	Complainant Files Rebuttal Evidence	500
April 2, 2012	June 20, 2012	Parties File Final Briefs	540

*Days elapsed since SMEPA filed its Complaint.

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of August, 2011, I caused a copy of the foregoing Reply in Opposition to Complainant's Petition to Revise Procedural Schedule to be served on the following parties by first class mail, postage prepaid or more expeditious method of delivery:

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A handwritten signature in black ink, appearing to read 'Eva Mozena Brandon', is written over a horizontal line.

Eva Mozena Brandon